IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION		MDL Docket No. 1446
This Document Relates To:		
MARK NEWBY, et al, Plaintiffs v. ENRON CORP., et al, Defendants	X X X X X X	C.A. No. H-01-3624 and Consolidated Cases
CONSECO ANNUITY ASSURANCE COMPANY, Individually and on Behalf Of All Others Similarly Situated, Plaintiff, v. CITIGROUP, INC., CITIBANK, N.A., CITICORP, SALOMON SMITH BARNEY, SALOMON BROTHERS INTERNATIONAL LIMITED, et. al. Defendants,	X X X X X X X X X X X X X X	H-03-CV-2240

CONSECO ANNUITY ASSURANCE COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO THE NEWBY LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION

1770

PRELIMINARY STATEMENT

Conseco Annuity Assurance Company ("Conseco") respectfully submits this memorandum in opposition to the Newby Lead Plaintiff's Amended Motion for Class Certification (the "Class Certification Motion"). Conseco opposes that motion to the degree it seeks certification of a class in the Newby Action which class would include purchasers of credit linked notes issued by Citigroup ("Citigroup CLNs").[1] That opposition is also supported by the Declaration of Conseco Annuity Assurance Company in Opposition to Newby Lead Plaintiff's Motion for Class Certification and Declaration of IHC Health Plans, Inc. in Opposition to Newby Lead Plaintiff's Motion for Class Certification.

The Newby Lead Plaintiff has moved this Court for an order certifying a class of "all persons who purchased the public traded equity and debt securities of Enron Corporation ("Enron"), between October 19, 1998 and November 27, 2001." Newby Lead Plaintiff has defined "Enron publicly traded...securities" to include the Citigroup Credit Linked Notes, (see Class Certification Motion, p. 1, n.1, incorporating the securities identified in the Newby First Amended Consolidated Complaint, at ¶986, n. 20), even though the Citigroup CLNs are securities issued by Citigroup – not Enron.

The Class Certification Motion should be denied to the extent that it seeks certification of a Class defined to include purchasers of the Citigroup CLNs, because:

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[1] The Citigroup Credit Linked Notes were not issued by Enron. Rather, they were issued by trusts created by Citigroup. They included the following securities: (a) Yosemite Securities Trust I 8.25% Series 1999-A Linked Enron Obligations maturing November 15, 2004, issued in the aggregate amount of $750,000,000 on or about November 4, 1999; (b) Yosemite Securities Trust II 8.75% Series 2000 Linked Enron Obligations maturing February 2007, issued in the aggregate amount of £200,000,000 on or about February 23, 2000; (c) Credit Linked Notes Trust 8% Notes maturing August 15, 2005, issued in the aggregate amount of $500,000,000 on or about August 25, 2000; (d) Credit Linked Notes Trust II 7 3/8 % Notes maturing May 15, 2006, issued in the aggregate amount of $500,000,000 on or about May 24, 2001; (e) Enron Sterling Credit Linked Notes Trust 7 1/4% Notes maturing May 24, 2006, issued in the aggregate amount of £125,000,000 on or about May 24, 2001; and (f) Enron Euro Credit Linked Notes Trust 6 1/2% Notes maturing May 24, 2006, issued in the aggregate amount of 200,000,000 Euro on or about May 24, 2001.

(i) none of the proposed class representatives in Newby purchased any of the Citigroup CLNs, and the Newby proposed class representatives therefore do not have standing to assert any claims arising out of the issuance and sale of the Citigroup CLNs; and

(ii) the adequacy element of Federal Rule of Civil Procedure 23(a)(4), is not satisfied here because both the Newby Lead Plaintiff, as well as their counsel, are inadequate to represent the Citigroup CLN purchasers.

In light of these facts, Conseco respectfully requests that this Court deny Lead Plaintiff's Motion for Class Certification to the degree it seeks certification of a class in the Newby Action that is defined to include purchasers of Citigroup CLNs.

FACTUAL BACKGROUND

Newby v. Enron (the "Newby Action") was filed on or about October 20, 2001, alleging claims on behalf all persons who acquired Enron's publicly traded securities. By Memorandum and Order, dated February 15, 2002, this Court appointed the Regents of the University of California, as Lead Plaintiff, on behalf of the purchasers of publicly traded debt and equity securities of Enron (the "Newby Lead Plaintiff") during a proposed class period from October 19, 1998 through November 27, 2001 (the "Class Period"). *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 458 (S.D.Tex. 2002). Neither that Order, nor the requisite notices published pursuant to pursuant to Section 21D of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §78u-4(a)(3)(A)(i) (all of which referred to "Enron stock" or "Enron securities"), contemplated that the Newby Lead Plaintiff would be prosecuting claims on behalf of purchasers of securities that had not been issued by Enron such as the Citigroup CLNs.

Following the appointment of the Newby Lead Plaintiff, on April 8, 2002, the Newby Lead Plaintiff filed a Consolidated Complaint for Violations of the Securities Laws (the "Newby Consolidated Complaint"), on behalf of purchasers of Enron's "publicly traded equity and debt securities between 10/1/98 and 11/27/01." Newby Consolidated Complaint, ¶¶1, 79-81. The

Newby Consolidated Complaint defined Enron's publicly traded equity and debt securities as follows:

> Enron's publicly traded debt securities and equity securities as well as preferred securities issued by Enron, Enron Capital LLC 8% Cumulative Guaranteed Monthly Income Preferred Shares, Enron Capital Trust I Originated Preferred Securities, Enron Capital Trust II Trust Originated Securities and Enron Capital Resources, L.P. 9% Cumulative Preferred Securities (collectively, the "Preferred Securities").

Id., ¶986, n. 15.

Neither the initial Newby complaint, nor the Newby Consolidated Complaint, alleged claims on behalf of purchasers of Citigroup CLNs.

On September 29, 2002, Hudson Soft Co., Ltd. ("Hudson Soft") filed the First Amended Class Action Complaint in an action entitled, *Hudson Soft Co., Ltd. v. Credit Suisse First Boston Corp.*, et al. No. 01-CV-5768 (SDNY) (the "Hudson Soft Action"), that alleged class claims arising under the federal securities laws on behalf of the Citigroup CLN Class.[2] On that same day, Hudson Soft also caused a notice to be published on PR Newswire in order to satisfy the requirements of the PSLRA, 15 U.S.C. §§ 78u-4(a)(3)(A)(i). On November 27, 2002, within the time period prescribed by the PSLRA, Hudson Soft and Conseco filed a Notice of Motion to be appointed as Lead Plaintiffs (the "Conseco Lead Plaintiff Motion"), which *inter alia*, sought appointment of Conseco as the Lead Plaintiff on behalf of all purchasers of the Citigroup CLNs. The Newby Lead Plaintiff did not move to be appointed lead plaintiff of the Citigroup CLN Class within the time proscribed by the PSLRA.[3] The Hudson Soft Action was subsequently transferred to this Court and numbered H-03-CV-0860.

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[2] The Hudson Soft Action also alleged claims against Credit Suisse First Boston on behalf of purchasers of credit linked notes issued by Credit Suisse First Boston that listed Enron as the credit reference entity.

[3] Conseco is not aware of any other party that has filed any motion for appointment of lead plaintiff on behalf of the Citigroup CLN Class in accordance with the PSLRA. The Conseco Lead Plaintiff Motion is still pending.

Conseco also filed a class action alleging claims under the federal securities laws on behalf of itself and all other purchasers of Citigroup CLNs against Citigroup and Citigroup related entities (collectively, "Citigroup"). That lawsuit, which is captioned *Conseco Annuity Assurance Co v. Citigroup, Inc., et al.*, was filed in the United States District Court for the Southern District of New York, and was subsequently transferred to this Court by the Judicial Panel on Multi District Litigation and numbered No. H-03-CV-2240) (the "Conseco Action"). The complaint in the Conseco Action reflects extensive investigation by Conseco and its Counsel and consists of 165 pages, with 75 evidentiary exhibits.

On or about May 14, 2003, the Lead Plaintiff in the Newby Action filed its Second Consolidated and Amended Class Action Complaint ("Second Amended Newby Complaint"). For the first time, the Newby Lead Plaintiff purported to allege claims on behalf of purchasers of Citigroup CLNs. In what appears to be merely an afterthought, in footnote 20, on page 625 of the Second Amended Newby Complaint, the Newby Lead Plaintiff purports to vastly expand the scope of the proposed Newby Class by re-defining the phrase Enron "publicly traded securities" to paradoxically include the Citigroup CLNs, which were not issued by Enron. See Second Amended Newby Complaint, ¶968, n. 20.

Remarkably, the Newby Lead Plaintiff purportedly sought to add these footnoted claims against Citigroup on behalf of purchasers of Citigroup CLNs, even though:

(i) none of the proposed Newby class representatives, including the Lead Plaintiff, ever purchased any Citigroup CLNs, resulting in a complete lack of standing to assert these claims (an issue which several of the bank defendants have raised in their motions to dismiss); and

(ii) at the time the Newby Plaintiff filed the Second Amended Newby Complaint, the Newby Lead Plaintiff and Lead Counsel were aware that the Conseco Action had long been filed, that Conseco had standing to assert these claims because it had purchased Citigroup CLNs, and that the claims asserted in the Conseco Action were not time-barred.

Keenly aware that the Newby Plaintiff lacked standing to assert claims on behalf of purchasers of Citigroup CLNs, and that this lack of standing could result in a dismissal of the Citigroup CLN claims in the Second Amended Complaint in Newby purportedly being asserted on behalf of purchasers of Citigroup CLNs, the Newby Lead Counsel sought to intervene IHC Health Plans, Inc. ("HPI") and Deseret Mutual Benefit Administrators ("DMBA") as named plaintiffs in the Newby Action. On September 15, the Chief Investment Officer of HPI was deposed in connection with the Class discovery in this action. [4]

Following HPI's deposition, and before this Court had ruled on HPI's and DMBA's motions to intervene, both HPI and DMBA directed Milberg Weiss Bershad Hynes & Lerach ("Newby Lead Counsel" or "Milberg Weiss") in the Newby Action to immediately withdraw their respective Motions for Intervention and terminated their representation by Lead Counsel.

As detailed in the HPI Declaration annexed hereto, the decisions to withdraw the intervention motion, immediately terminate their representation by Newby Lead Counsel, and to pursue a recovery through the Conseco Action was based on these institutional investors learning that their interests, and the interests of all other Citigroup CLN purchasers, would be severely compromised by the actions being taken by Lead Counsel in the Newby Action, and that unavoidable conflicts of interest existed between the members of the purchasers of Enron publicly traded securities and the purchasers of Citigroup CLNs. These drastic actions undertaken by fully informed institutional investors speak volumes, and demonstrate that this Court should deny the Newby Lead Plaintiff's Class Certification Motion to the extent that it seeks certification of a class that is defined to include purchasers of the Citigroup CLNs.

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[4] The motion to intervene on behalf of HPI was filed on August 27, 2003. Newby Lead Counsel filed the DMBA motion to intervene immediately after the September 15, 2003 deposition of IHC Health Plans.

ARGUMENT

I. The Newby Plaintiffs Lack Standing To Assert Claims In Connection With the Issuance and Sale of the Citigroup CLNs

Well-settled case law requires that "[a]ny analysis of class certification must begin with the issue of standing." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir.1987); *see also Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) (stating that the "constitutional threshold [of standing] must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed.R.Civ.P. 23").

> Thus, ... prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim. "[A]ny analysis of class certification must begin with the issue of standing." "Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, "each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279-80 (11th Cir. 2000), quoting *Griffin v. Dugger*, 823 F.2d 1476, 1482-83 (11th Cir.1987). *See also Hines v. Widnall*, 334 F.3d 1253 (11th Cir. 2003) ("Typicality measures whether a sufficient nexus exists between the claims of the named representative and those of the class at large. Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class."); *Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315, 318 (5th Cir.2002) ("[s]tanding is an inherent prerequisite to the class certification inquiry"); *Bertulli v. Independent Ass'n of Continental Pilots.*, 242 F.3d 290, 294 (5th Cir. 2001) ("Standing, however, goes to the constitutional power of a federal court to entertain an action... This constitutional threshold must

be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by [Rule] 23"); *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) ("Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue.").

Under Article III of the United States Constitution, federal courts have jurisdiction over a dispute only if it is a "case" or "controversy." As the Supreme Court said in *Simon v. Eastern Ky. Welfare Rights Organization*: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." 426 U.S. 26, 37, 96 S.Ct. 1917, 1924 (1976).

"As an incident ... of this bedrock requirement, th[e Supreme] Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752 (1982); *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312 (1997) ("One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). Standing, therefore, is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). In order "to meet the standing requirements of Article III, a plaintiff must allege personal injury fairly traceable to the defendant's alleged unlawful conduct and likely to be redressed by the relief requested." *Raines*, 521 U.S. at 818; *Lujan*, 504 U.S. at 560-61; *Valley Forge Christian College*, 454 U.S. at 471.

The Supreme Court has always insisted on strict compliance with its standing requirements and has held that "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717 (1990). As the Supreme Court stated in *Raines*:

> We must put aside the natural urge to proceed directly to the merits ... and to settle it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether [plaintiffs] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

521 U.S. at 820.

The Newby Plaintiffs did not purchase any of the Citigroup CLNs and therefore, cannot establish that they suffered a "personal, particularized, concrete, and otherwise judicially cognizable" injury in connection with the issuance and sale of the Citigroup CLNs.

As the Court of Appeals for the Fifth Circuit held in *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981): "Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue." The Fifth Circuit in *Brown* went on to cite Chief Justice Burger's concurring opinion in *Allee v. Medrano*, in which he analyzed the situation in the following terms:

> A named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

Brown, 650 F.2d at 771, quoting *Allee*, 416 U.S. 802, 828-29, 94 S.Ct. 2191 (Burger, C. J., concurring).

Thus, "[a] court must assess standing to sue based upon the standing of the named plaintiffs and not upon the standing of unidentified class members." *In re General Motors Class*

E Stock Buyout Sec. Litig., 694 F.Supp. 1119, 1126 (D. Del. 1988); *Adair v. Sorenson*, 134 F.R.D. 13, 16 (D. Mass. 1991).

Because the Newby Plaintiffs have not been injured in connection with the sale of the Citigroup CLNs, they do not have standing to assert such claims. Moreover, the law is clear that they cannot base their standing on the injuries suffered by Conseco, and the other purchasers of the Citigroup CLNs.

Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. *Warth*, 422 U.S. at 499-500. *See also Intn'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) ("Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. Typically the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.").

In this case, the Newby Plaintiffs attempt to assert claims against Citigroup in connection with the issuance and sale of the Citigroup CLNs under Section 12(a)(2) of the Securities Act of 1933 (the "Securities Act") and Section 10(b) of the Securities Exchange Act of the 1934 (the "Securities Exchange Act"), even though none of the Newby Plaintiffs purchased the Citigroup CLNs. They do not have standing to assert either claim.

Section 12(a)(2) of the Securities Act, by its express terms, limits recovery to purchasers the securities at issue. 15 U.S.C. §771(a)(2). *See 7547 Corp. v. Parker & Parsley Development Partners*, 38 F.3d 211, 225 (5th Cir. 1994) ("standing to sue under the private right of action afforded by [Section 12(2)] is based upon the requirement that the plaintiff be a 'purchaser' of the security at issue"). Thus, the Southern District of Texas has held that plaintiffs who did not

"acquire" any of the securities offered in a public notes offering had no standing to bring Securities Act claims on behalf of a class of purchasers who did purchase securities in that offering:

> Plaintiffs therefore have failed to plead the express statutory standing requirements for an action under Section 11 and 12 of the Securities Act, and they have failed to state a cause of action upon which relief can be granted with respect to the Notes Offering.

In re Paracelsus Corp., Sec. Litig., 6 F. Supp.2d 626, 631 (S.D. Tex. 1998).[6]

Similarly, the Supreme Court determined that recovery under Section 10(b) of the Securities Exchange Act is also limited to purchasers or sellers of the securities at issue. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735 (1975). The Supreme Court reasoned that the express causes of action created by Congress in Sections 11 and 12 of the Securities Act limit recovery to "an person acquiring such security" and "to the person purchasing such security," respectively. *Id.* at 736. Relying on *Blue Chip Stamp*, the Fifth Circuit has repeatedly dismissed Rule 10b-5 claims when the plaintiff has failed to meet the purchaser-seller requirement. *See, e.g., Kaplan v. Utilicorp United, Inc.*, 9 F.3d 405, 407 (5th Cir. 1993); *Smith v. Ayers*, 977 F.2d 946, 949-50 (5th Cir. 1992); *Rathborne v. Rathborne,* 683 F.2d 914, 918 (5th Cir. 1982) ("In order to bring a private damage action under Rule 10b-5 a plaintiff must allege that he himself was an actual purchaser or seller of securities. Thus, even if it can be established that there has been wrongdoing "in connection with the purchase or sale of a security," a private party does not have

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[6] *See also Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 965 (9th Cir. 1990) (dismissing claims under Section 12(2) of the Securities Act when plaintiffs were not purchasers or offerees in the offering at issue); *In re Azurix Corp. Sec. Litig.*, 198 F.Supp.2d 862, 892 (S.D. Tex. 2002) (plaintiffs have no standing to sue under Sections 11 or 12 of the Securities Act because they did not purchase their shares of Azurix stock in the company's initial public offering); *Danis v. USN Communications, Inc.*, 189 F.R.D. 39, 400 (N.D. Ill. 1999) (plaintiffs lacked standing to assert Section 12(a)(2) claims against each member of the underwriter defendant class because Section 12(a)(2) requires privity between a plaintiff and the seller of the securities at issue and it permits suit against the seller of a security only by "the person purchasing such security from him"); *Moskowitz v. Mitcham Ind.*, 1999 WL 33606198 *2 (S.D.Tex., Sep 28, 1999) (the only plaintiffs who have standing to sue under Section 12 are those who have purchased their shares directly from a seller in the offering); *In re Delmarva Sec. Litig.*, 794 F.Supp. 1293, 1309 (D.Del.1992) (dismissing Section 12(a)(2) claim where class plaintiffs lacked individual standing to assert claims against defendants).

standing to recover under Rule 10b-5 unless the plaintiff can allege and ultimately establish that he himself was a purchaser or seller.").

In its August 7, 2002 Order, this Court recognized that "it is evident that some groups of Plaintiffs do not fit into the class definition of the Consolidated Complaint and that Lead Plaintiff may not have standing to be a class representative" and stated that the Court would deal with issues of standing "around the time of class certification ... through the creation of classes or subclasses having standing to pursue those claims." *Id.* at 6. That time has arrived. Because the *Newby* Plaintiffs did not purchase in the Citigroup CLNs[7], they do not have standing to sue under either section 10(b) of the Securities Exchange Act or section 12(a)(2) of the Securities on behalf of those Citigroup CLN Class.[8]

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[7] It is undisputed that neither the Newby Lead Plaintiff or any of the other Newby Plaintiffs or proposed Newby class representatives purchased the Citigroup CLNs.

[8] Relying upon *In re American Continental Corp./Lincoln Savings & Loan Sec. Litig.*, 794 F.Supp. 1424 (D. Ariz. 1992), Lead Plaintiff argues that it is proper to certify a single class of investors who purchased different types of securities and that plaintiffs need not name a representative with standing to sue on behalf of each class of securities. This argument is contrary to the argument previously made by Lead Plaintiff in opposition to the Joint Motion of Certain Defendants to Strike Pulsifier Class Action, where Lead Plaintiff recognized that it needed a separate class representative with standing to sue on behalf of the purchasers of each class of securities. *See In re Enron Corporation Securities, Derivative & "Erisa Litigation,"* 258 F.Supp.2d 576, 611 (S.D. Tex. 2003) (observing that once van de Velde has withdrawn, Lead Plaintiff decided to substitute Nathaniel Pulsifier "to insure that Plaintiff had a 7% Note class representative with standing").

It also has been soundly rejected by the Courts. Thus, in *Nenni v. Dean Witter Reynolds, Inc*, the Court in dismissing a complaint, held that the plaintiff could not sue with regard to mutual funds in which he had not invested:

> "It is undisputed that Nenni has acquired stock in only four of the mutual funds he names in the complaint. Nenni attempts to include in the class purchasers of all forty-one mutual funds listed. This is inappropriate. Nenni has standing to bring claims for the shares in the four mutual funds that he actually holds. That is, Nenni at most can only create a class of people who have purchased shares of same mutual funds that he actually holds."

Civil Action No. 98-12454-REK, Memorandum and Order, Slip Op. at 5 (D. Mass. Sept. 29, 1999). S*ee also Ramos v. Patrician Equities Corp.*, 765 F.Supp. 1196, 1199 (S.D.N.Y.1991) (even though one of the named plaintiffs had standing to sue a defendant accounting firm in connection with his purchase of a limited partnership interest, he did not have standing to sue that defendant in connection with the accounting firm's work for 19 other limited partnerships); *In re Colonial Ltd. Partnership Litigation,* 854 F.Supp. 64, 82-83 (D.Conn.1994) (where the Court held that the named plaintiff lacked standing to bring claims on behalf of purchasers of limited partnership interests in which named plaintiff had not invested); *Spira v. Nick,* 876 F.Supp. 553, 562 (S.D.N.Y. 1995) (where the court held that plaintiff does not have standing to seek relief on behalf of the investors of the twenty-three other entities in which he does not claim an interest).

II. The Newby Plaintiffs Have Not Satisfied The Adequacy Element of Rule 23

In addition to the Newby plaintiffs' lack of standing to prosecute claims on behalf of purchasers of Citigroup CLNs, the Newby plaintiffs' request for certifiocation of a class defined to include purchasers of Citigroup CLNs must also be denied because the requirements of Fed. r. Civ. P. 23(a)(4) are not satisfied here.

Fed. R. Civ. P. 23(a)(4) requires a class representative who "will fairly and adequately protect the interests of the class." Adequacy of representation is a question of fact and requires a court to explore two separate prongs: (1) the class representative's interests must not be antagonistic to those of the remaining class and (2) class counsel must be sufficiently qualified and experienced to prosecute the action vigorously. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001); *In re First Plus. Fin. Grp. Sec. Litig.*, 2002 U.S. Dist. LEXIS 20446, *18 (N.D.Tx. 2002). Because the Newby plaintiffs have failed to satisfy both prongs of Fed. R. Civ. P. 23(a)(4), the Newby Plaintiffs may not be certified as representatives of the Citigroup CLN Class.[9]

Finally, in *American Continental*, the class purchased different types of securities (i.e., stocks, bonds and debentures), which were all issued by American Continental. In this case, by contrast, the Citigroup CLNs were not issued by Enron line but by trusts created by Citigroup.

[9] The Newby Lead Plaintiff argues that in its ruling on the Lead Plaintiff Motion, this Court has made a preliminary determination that it is a typical and adequate representative. Class Certification Motion, pp. 17-18. However, at the time Regents was appointed Lead Plaintiff, it did not even purport to be representing the interests of the Citigroup CLN purchasers. Moreover, in language omitted by Lead Plaintiff, this Court made clear that "the inquiry at this stage of the litigation in selecting the Lead Plaintiff is not as searching as the one triggered by a subsequent motion for class certification." *Enron*, 206 F.R.D. at 441. *Id.* The Court also recognized, in response to objections by other proposed lead plaintiffs, that they "have raised important concerns" and "have set out some well-founded and persuasive arguments for separate representation and classes or subclasses at class certification, as well as for trial," but that at the lead plaintiff stage, the court was "obligated to apply the express, objective criteria" of the PSLRA. *Id.* at 451. *See also In re Initial Public Offering Sec. Litig.*, 214 F.R.D. 117 (S.D.N.Y. 2002) ("The purpose of the lead plaintiff section of the PSLRA was never to do away with the notion of class representatives or named plaintiffs in securities class actions. ... The fact that the lead plaintiff is to be selected in accordance with objective criteria that have nothing to do with the nature of the claims (as described above) strongly suggests the need for named plaintiffs in addition to any lead plaintiff.").

Any representation of the Citigroup CLN Class by Lead Counsel and Lead Plaintiff in the Newby Action would be antagonistic to the interests of the Citigroup CLN Class because material conflicts exist between the Citigroup CLN Class and the purchasers of Enron publicly traded securities. These conflicts arise from the fact that, as summarized below, the claims of the Citigroup CLN purchasers are much stronger than the claims of the purchasers of Enron publicly traded securities. Essentially, representation by Lead Counsel and Lead Plaintiff in the Newby Action would lead to a dilution in recovery for the Citigroup CLN purchasers.

Similarly, the facts demonstrate Milberg Weiss' inadequacy to represent the Citigroup CLN purchasers. During its deposition, HPI testified:

(1) That Milberg Weiss had contacted HPI by means of a telephonic "cold call," through a London intermediary;

(2) Milberg Weiss failed to inform HPI of the existence of the Conseco Action or of Conseco's long involvement in representing the interests of the Citigroup CLN purchasers. Rather, HPI was led to believe that no Citigroup CLN purchaser was prosecuting the claims of the Citigroup CLN purchasers;

(3) Milberg Weiss had not informed HPI that the recently added, Citigroup CLN claims in the Newby Action were being challenged as time barred;

(4) Milberg Weiss had not informed HPI that Conseco had filed a motion in opposition to HPI's motion to intervene; and

(5) Milberg Weiss, however, did inform HPI that HPI and the other Citigroup CLN purchasers would have to sacrifice any recovery that reflected the strength of its claims compared to the claims of Lead Plaintiff in the Newby Action.

Those facts demonstrate that Milberg Weiss sought HPI's intervention only as a means of amassing as much control over the Newby Action as possible for its own benefit, and not for the benefit of the Citigroup CLN purchasers and demonstrate Milberg Weiss' inadequacy as counsel for the Citigroup CLN Class. Under these circumstances, Rule 23's adequacy of representation requirement is not satisfied. Accordingly, this Court should deny Newby Lead Plaintiff's motion for class certification of a class that includes the purchasers of the Citigroup CLNs.

The interests of the Newby Lead Plaintiff and other named Plaintiffs in the Newby Action are antagonistic to those of the Citigroup CLN Class. Conflicts that go to the "subject matter of the litigation" will qualify as antagonistic and hence, defeat a party's representative status. *Gibb v. Delta Drilling Co.*, 104 FRD 59, 75 (S.D. Tx. 1984). Four such conflicts exist here.

The first conflict involves the strength of the claims possessed by members of the Citgroup CLN Class. In an effort to pass on the risk of loss accrued as the result of the money lent to Enron, a company that Citigroup knew was improperly accounting for its transactions with Citigroup, Citigroup issued and sold the Citigroup CLNs to unsuspecting investors. Furthermore, Citigroup obtained, directly or indirectly the $2.4 billion proceeds from the sale of the Citigroup CLNs. In so doing, Citigroup directly violated federal securities laws. These claims, which Citigroup CLN purchasers possess, are not vulnerable to "aiding and abetting" attacks based on *Central Bank. Central Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164 (1994). According to HPI, Milberg Weiss, Lead Counsel for the Newby Plaintiffs, stated that Citigroup CLN purchasers would only receive a pro-rata share of the total recovery shared equally with all other Newby class members -- a share that does not reflect the strength of the Citigroup CLN claims and that is diluted by the claims of other Newby plaintiffs. See HPI Declaration. Because joining the Newby Action would result in a diluted recovery for Citigroup CLN purchasers, the interests of the Citigroup CLN purchasers are in direct conflict with those of the existing Newby Lead Plaintiff and Lead Counsel. The existence of such conflict demonstrates that representation by the Newby plaintiffs is inadequate.

The second existing conflict that goes to the "subject matter of the litigation" involves the manner in which the existing claims in the Newby Action are pled. As described above, Citigroup CLN purchasers possess very strong claims against Citigroup for its direct violation of

the federal securities laws by issuing and selling the Citigroup CLNs. In contrast, the Newby plaintiffs allege that Citigroup's involvement in the Enron fraud permitted Enron to report fraudulent financial statements, which ultimately caused the price of Enron securities to become artificially inflated. While, in deciding motions to dismiss the Newby Consolidated Complaint in Newby, this Court held that the claims against Citigroup and the other financial institutions at the pleading stage, were not barred by *Central Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164 (1994), those claims remain vulnerable to that argument being raised again at the summary judgment stage, at trial and on appeal. Since the claims of Citigroup CLN purchasers against Citigroup are immune from attack under *Central Bank*, representation of the Citigroup CLN purchasers in the Newby Action would be inadequate.

Third, the inadequacy of representation by Newby plaintiffs is further demonstrated by the fact that the Newby plaintiffs did not allege claims on behalf of the Citigroup CLN Class within the proscribed one-year statute of limitations.

The Newby Consolidated Complaint was filed on April 8, 2002, in which the Newby plaintiffs did not assert claims on behalf of the Citigroup CLN Class. The Newby First Amended Complaint (in which, for the first time, the Newby plaintiffs asserted claims on behalf of the Citigroup CLN Class) was filed on May 14, 2003, more than one year after the Newby Consolidated Complaint was filed, and more than one and one half years after Enron announced its restatement of earnings on October 16, 2001. *See* Newby Am. Cplt. ¶61. Citigroup has sought dismissal of the Newby plaintiffs' claims against Citigroup, on behalf of the Citigroup CLN Class, arguing that they are time-barred. No such argument exists for the claims in the Conseco Action asserted on behalf of the Citigroup CLN purchasers. Hence, once again, representation of the Citigroup CLN purchasers, by Lead Plaintiff and Lead Counsel in Newby would be inadequate.

Finally, while the first prong of the "adequacy" analysis requires an inquiry into the claims of the representative plaintiff, the second prong requires an evaluation of the representative plaintiff's counsel. *See Hewlett v. Premier Salon Int'l, Inc.*, 185 F.R.D. 211, 218. Here, nothing can be more demonstrative of Milberg Weiss's glaring inadequacy as the deposition testimony and affidavit of the once-proposed intervenor, HPI.

According to HPI, who was a purchaser of Citigroup CLNs, HPI was telephonically contacted by an agent of Milberg Weiss, Magenta One ("Magenta") in March of 2003. See Declaration. Discussions with Magenta ultimately led to the retention of Milberg Weiss, in August 2003, by HPI, for the purposes of intervening as a plaintiff in the Newby Action. *See* HPI Declaration. However, Milberg Weiss did not inform HPI that its interests were currently being represented in the Conseco Action, despite the fact that the Conseco Action had been filed over one year earlier. *See* HPI Declaration. Rather, Milberg Weiss led HPI to believe that if it did not intervene in the Newby Action, the claims of the Citigroup CLN purchasers would not be prosecuted at all. HPI Declaration. HPI testified that Milberg Weiss also failed to inform HPI that the claims asserted in the Newby Action had been challenged as untimely; or that defendants and Conseco had filed oppositions to its intervention. *See* HPI Declaration. HPI found such omissions disturbing and stated that it would have expected Milberg Weiss to inform it of such important information. *See* HPI Declaration. Indeed, the very first time that HPI learned most of this information was at the deposition. In failing to inform HPI of such relevant information, Milberg Weiss demonstrated its utter inadequacy as counsel for the Citigroup CLN purchasers.

That testimony makes clear that Milberg Weiss sought the intervention of HPI, not for HPI's benefit, or even for the benefit of Citigroup CLN purchasers, but only for its own benefit. Such actions speak clearly to Milberg Weiss's inadequacy as counsel for the Citigroup CLN purchasers.

After the HPI deposition, HPI (and the second intervenor proposed by Milberg Weiss, DMBA) concluded that because the interests of the Citigroup CLN purchasers are irreconcilably conflicted with those of the existing plaintiffs in the Newby Action and because of Milberg Weiss' failure to fully inform HPI of the developments in the Newby Action and the Conseco Action, the interests of the Citigroup CLN purchasers could not be adequately represented by Lead Plaintiff or Lead Counsel in the Newby Action. *See* HPI Declaration; Conseco Declaration annexed hereto. Accordingly, both HPI and DMBA withdrew their motions to intervene and terminated representation by Milberg Weiss. See HPI Declaration.

HPI and DMBA further concluded that while the Newby plaintiffs were inadequate representatives, Conseco was highly capable of representing the interest of the Citigroup CLN purchasers in the Conseco Action. *See* HPI Declaration. Since prior to the commencement of the Conseco Action, Conseco has repeatedly met and conferred with Counsel, both telephonically and in person; reviewed, commented on, and edited all of the filings made by Counsel; stayed informed of all developments in the litigation; provided feedback on the strategy and structure of the litigation; attending the recent mediation session; and provided Counsel with Conseco's views during such mediation. Conseco Declaration.

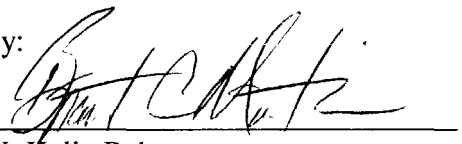
Additionally, Conseco has attested to its continued willingness to maintain an active role in the Conseco Action. Conseco Declaration.

In light of the inadequacy demonstrated by the inherent conflicts of interest and the neglectful and manipulative nature of Milberg Weiss' conduct with respect to the Citigroup CLN purchasers' claims, the requirements of Rule 23 are not satisfied. This Court should therefore, deny Lead Plaintiff's Motion for Class certification to the degree it seeks certification of a class defined to include purchasers of Citigroup CLNs.

CONCLUSION

For the foregoing reasons, Plaintiff Conseco Annuity Assurance Co. respectfully requests that this Court deny Lead Plaintiff's Motion for Class Certification to the degree it seeks certification of a class defined to include purchasers of Citigroup CLNs.

Dated: October 16, 2003

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing CONSECO ANNUITY ASSURANCE COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO THE NEWBY LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION has been served by sending a copy via electronic mail to serv@ESL3624.com on this 16th day of October, 2003.

Brant C. Martin

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION		MDL Docket No. 1446
This Document Relates To:		
MARK NEWBY, et al, Plaintiffs v. ENRON CORP., et al, Defendants	X X X X X X	C.A. No. H-01-3624 and Consolidated Cases
CONSECO ANNUITY ASSURANCE COMPANY, Individually and on Behalf Of All Others Similarly Situated, Plaintiff, v. CITIGROUP, INC., CITIBANK, N.A., CITICORP, SALOMON SMITH BARNEY, SALOMON BROTHERS INTERNATIONAL LIMITED, et. al. Defendants,	X X X X X X X X X X X X	H-03-CV-2240

DECLARATION OF IHC HEALTH PLANS INC. IN OPPOSITION TO NEWBY LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

IHC Health Plans Inc. ("HPI"), by and through its Chief Investment Officer and authorized representative, Jacqueline Millard, makes this Declaration based upon personal knowledge. I am competent to testify on the matters stated herein and this Declaration is made under the penalty of perjury.

1. I am an authorized representative of HPI and am authorized to make and execute this Declaration.
2. From November 4, 1999 through and including December 3, 2001, HPI purchased $2 million of Citigroup credit-linked notes ("Citigroup" and "Citigroup CLNs" respectively.)
3. HPI was originally contacted, in an unsolicited telephone call, in March of 2003, by Magenta One ("Magenta"). The Magenta representative stated that Magenta was a London-based company with which Milberg, Weiss, Bershard, Hynes, & Lerach ("Milberg Weiss") has a "business relationship."
4. The Magenta representative also informed HPI, in that telephone conversation, that Magenta was in the business of tracking class action lawsuits, and recommended that HPI contact Milberg Weiss in order to participate in the lawsuit filed against Enron captioned Newby v. Enron Corp. et al., No. H-01-3624 (the "Newby Action") with respect to the Citigroup CLNs.
5. As a result of this telephone conversation, HPI spoke with an attorney from Milberg Weiss in July 2003. Milberg Weiss advised HPI that it wanted to represent HPI in the Newby Action, and wanted HPI to seek to intervene into the Newby Action and to seek appointment as a class representative of purchasers of the Citigroup CLNs.

6. From its discussions with Milberg Weiss, HPI was led to believe that if HPI did not quickly intervene in the Newby Action, HPI's claims, as well as the claims of all other purchasers of Citigroup CLNs, would not be prosecuted.

7. Milberg Weiss did not inform HPI of the pendency of an action entitled, Conseco Annuity Assurance Co v. Citigroup, Inc., et al, No. H-03-CV-2240 (S.D.Tx. 2003) (the "Conseco Action"), which HPI subsequently learned had long previously been filed, and which asserted claims on behalf of a class of all Citigroup CLN purchasers, including HPI.

8. HPI agreed to be represented by Milberg Weiss, and to seek to intervene in the Newby Action because it mistakenly understood that no other purchasers of Citigroup CLNs were prosecuting the claims of the purchasers of Citigroup CLNs. Thereafter, Milberg Weiss, on behalf of HPI, filed a motion to intervene HPI as a party in the Newby Action ("HPI Motion To Intervene").

9. As a result of the filing of the HPI Motion to Intervene, parties including various defendants in the Newby Action and the plaintiff in the Conseco Action, sought to, and did, depose a representative of HPI. I was designated HPI's representative by HPI and was deposed on September 15, 2003.

10. In conversations HPI had with Milberg Weiss prior to the deposition, HPI was informed by Milberg Weiss that any recovery obtained in the Newby Action would be allocated equally among all class members and sub-classes in proportion to their losses, without regard to the relative strength or weakness of any of their respective claims.

11. After learning about the Conseco Action and details of Conseco's long and intimate involvement in representing exclusively the interests of a class of all purchasers of

Citigroup CLNs, HPI concluded that Conseco and its counsel should represent the interests of HPI, and all other members of the Citigroup CLN purchaser class, and that these claims should be pursued exclusively through the Conseco Action. Accordingly, HPI directed Milberg Weiss to withdraw HPI's previously filed Motion To Intervene and terminated representation of HPI by Milberg Weiss.

12. Under penalty of perjury, I swear that the foregoing is true and correct to the best of my knowledge.

Dated: October 16, 2003

Jacque Millard

Chief Investment Officer and
Authorized Representative of HPI

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION		MDL Docket No. 1446
This Document Relates To:		
MARK NEWBY, et al, Plaintiffs v. ENRON CORP., et al, Defendants	X X X X X X	C.A. No. H-01-3624 and Consolidated Cases
CONSECO ANNUITY ASSURANCE COMPANY, Individually and on Behalf Of All Others Similarly Situated, Plaintiff, v. CITIGROUP, INC., CITIBANK, N.A., CITICORP, SALOMON SMITH BARNEY, SALOMON BROTHERS INTERNATIONAL LIMITED, et. al. Defendants,	X X X X X X X X X X X X X	H-03-CV-2240

DECLARATION ON BEHALF OF CONSECO ANNUITY ASSURANCE COMPANY IN OPPOSITION TO NEWBY LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Conseco Capital Management, Inc., now known as 40186 Advisers, Inc., for its affiliate, Conseco Annuity Assurance Company, by and through its Vice President and authorized representative, Greg Seketa, makes this Declaration based upon personal knowledge. I am

competent to testify on the matters stated herein and this Declaration is made under the penalty of perjury.

1. Conseco Capital Management, Inc. n/k/a 40186 Advisers, Inc. (the "Adviser") is a registered investment adviser and the fixed income asset manager for its affiliate, Conseco Annuity Assurance Company ("CAA", collectively Adviser and CAA are, from time to time, referred to herein as "Conseco").
2. This Declaration is submitted in support of Conseco's opposition to the Newby Lead Plaintiff's Motion For Class Certification. Conseco opposes that motion to the degree that it seeks certification of a class in the Newby Action which would include the purchasers of Citigroup credit-linked notes ("Citigroup CLNs").
3. From November 4, 1999 through and including December 3, 2001, CAA purchased $22.05 million of Citigroup CLNs. In addition, other affiliated and unaffiliated clients of Adviser purchased substantially more Citigroup CLNs.
4. After CAA sustained a loss of more than $6 million resulting from its sales of Citigroup CLNs, Adviser began an investigation into the possibility of asserting claims for violations of federal securities laws against Citigroup.
5. In connection with that investigation, Conseco became aware of class actions which had been filed in, or transferred to, this Court, arising out of the Enron debacle. Conseco understood that those class actions were brought on behalf of purchasers of some, or all, of Enron's publicly traded securities.
6. The Citigroup CLNs were not issued by Enron. They were issued and sold by Citigroup and its affiliates. Accordingly, the Citigroup CLNs are not Enron publicly traded

securities, and the Citigroup CLNs were apparently not the subject of the other Enron class actions which had been filed or transferred to this Court.

7. In connection with its investigation, Conseco also became aware of a notice that had been published pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), in connection with the action entitled Hudson Soft Co., Ltd. v. Credit Suisse, et. al., (then pending in the United States District Court for the Southern District of New York, and subsequently transferred to this Court by the Judicial Panel on Multi District Litigation and numbered No. 01-CV-5768) (the "Hudson Soft Action"), advising purchasers of the Citigroup CLNs of their right to seek appointment as Lead Plaintiff in the Hudson Soft Action.

8. As part of this investigation, Conseco spoke with several attorneys and ultimately retained the law firms of Abbey Gardy, LLP of New York and Shapiro Haber & Urmy of Boston (collectively "Counsel").

9. In response to the PSLRA notice published in connection with the Hudson Soft Action, Conseco timely filed a motion to be appointed Lead Plaintiff on behalf of a class of purchasers of the Citigroup CLNs. To my knowledge, Conseco is the only purchaser of Citigroup CLNs to have timely sought to be appointed Lead Plaintiff on behalf of the purchasers of the Citigroup CLN, pursuant to the PSLRA.

10. Conseco also filed a class action alleging claims under the federal securities laws on behalf of itself and all other purchasers of Citigroup CLNs against Citigroup and Citigroup related entities (collectively, "Citigroup"). That lawsuit, which is captioned Conseco Annuity Assurance Co. v. Citigroup, Inc., et al., was filed in the United States District Court for the Southern District of New York, and was subsequently transferred to

this Court by the Judicial Panel on Multi District Litigation, No. H-03-CV-2240) (the "Conseco Action"). The Complaint in the Conseco Action reflects extensive investigation by Conseco and its Counsel and consists of 165 pages, with 75 evidentiary exhibits.

11. I have reviewed the complaints filed in the action entitled, Newby v. Enron Corp, et al., No. H-01-3624 (the "Newby Action"). The original complaint in the Newby Action did not assert claims on behalf of Citigroup CLN purchasers, nor did any of the subsequent complaints filed by the Lead Plaintiff in the Newby Action, until Lead Plaintiff in the Newby Action filed the Second Consolidated and Amended Class Action Complaint (the "Second Amended Newby Complaint"). I have also reviewed Lead Plaintiff's Amended Motion For Class Certification filed in the Newby Action.

12. The Second Amended Newby Complaint purports to assert claims on behalf of a class of purchasers of Citigroup CLNs and Lead Plaintiff's Amended Motion For Class Certification filed in the Newby Action seeks certification of a class that has been defined to include purchasers of Citigroup CLNs. However, that Complaint and the documents filed in connection with Lead Plaintiff's Amended Motion For Class Certification filed in the Newby Action reflect that neither the Lead Plaintiff, any named plaintiff nor any person or entity seeking appointment as a class representative in the Newby Action ever purchased Citigroup CLNs.

13. Although Lead Plaintiff in the Newby Action sought the intervention of IHC Health Plan's Inc. ("HPI") and Deseret Mutual Benefit Administrators ("DMBA") to represent the class of Citigroup CLN purchasers, both of those entities withdrew their motions for

intervention and terminated their representation by Lead Counsel in Newby on September 30, 2003.

14. Since prior to the commencement of the Conseco Action, I have, on behalf of Conseco and the other purchasers of the Citigroup CLNs, been actively involved in directing the efforts of Counsel in this litigation. In particular, I have, amongst other things:

    a. repeatedly met and conferred with Counsel, both telephonically and in person;

    b. reviewed, commented on, and edited the filings made by Counsel;

    c. stayed informed of all material developments in the litigation;

    d. provided feedback on the strategy and structure of the litigation;

    e. attended the recent mediation session before Judge Conner and provided Counsel with Conseco's views during the mediation.

15. Conseco will continue to maintain an active role in this litigation and, as demonstrated by its prior conduct and commitment, takes seriously its responsibility to prosecute the claims on behalf of all purchasers of Citigroup CLNs aggressively, and in a manner that pursues solely the best interests of all members of the class of Citigroup CLN purchasers in order to maximize the recovery obtained by the Citigroup CLN purchasers.

16. Based on a review of the complaints filed in both the Conseco Action and the Newby Action, as well as a review of the papers filed in connection with Lead Plaintiff's Amended Motion For Class Certification, and transcript of the deposition of the chief investment officer of HPI, Conseco believes that irreconcilable conflicts of interest exist by and between the purchasers of Enron publicly traded securities, who are represented by Lead Plaintiff and Lead Counsel in the Newby Action, and the purchasers of the Citigroup CLNs.

17. Those conflicts of interests arise, in particular, because the claims of Conseco and the other purchasers of the Citigroup CLNs against Citigroup are factually and legally stronger than the claims of the purchasers of the Enron publicly traded securities for a variety of reasons, including the fact that Citigroup issued and sold the Citigroup CLNs, and the fact that Citigroup received the proceeds from the sale of the $2.4 billion of Citigroup CLNs.

18. Conseco understands, from the deposition of HPI, that Lead Plaintiff and Lead Counsel in the Newby Action intend to treat all members of the certified class equally, such that any recovery would be shared by all such class members pro rata to their established losses, without regard to the strength of their claims. This allocation would severely and impermissibly disadvantage members of the Citigroup CLN class by treating members of these classes in the same manner with respect to any recovery had in this litigation despite the clear relative strength of the claims of the Citigroup CLN class members.

19. The claims being pursued on behalf of Citigroup CLN purchasers in the Conseco Action are singular in focus and do not suffer from any conflict of interest because the case is being prosecuted by Conseco, through Counsel, who represent only, and who seek recovery only for, a class of similarly situated purchasers of Citigroup CLNs – and no other classes.

20. Conseco does not believe it is in the interests of the purchasers of the Citigroup CLN to be represented by Lead Plaintiff or Lead Counsel in Newby, or any of the plaintiffs named in the Second Amended Newby Complaint.

21. Conseco believes it is in the best interests of Conseco and the members of the Citigroup CLN purchaser class for their claims to be pursued through the Conseco Action, and

represented by Counsel retained by Conseco, whose only allegiance is to members of the Citigroup CLN class.

Under penalty of perjury, I swear that the foregoing is true and correct to the best of my knowledge.

Dated: October 16, 2003

Greg Seketa
Vice President
40186 Advisers, Inc.,
as Investment Adviser to Conseco
Annuity Assurance Company